SARAWAK GOVERNMENT *a*

v.

KCS SEAWMILL SDN. BHD.

HIGH COURT BORNEO, KUCHING
HAIDAR MOHD. NOOR J
[CIVIL APPEAL NO. KG. 22 OF 1989] *b*
21 FEBRUARY 1990

CIVIL PROCEDURE: *Application for summary judgment by respondent - Application by appellant to strike out the respondents application - Ambit of O. 26A of the Subordinate Courts Rules - Application against Government (the appellant) - Application of appellant dismissed - Summary judgment entered in favour of respondent - Parties had not addressed the Court in respect of respondent's application - Judge should allow respondent's application - Whether error on part of Sessions Court Judge - Appeal - Can summary judgment under O. 26A of the Subordinate Courts Rules be made against the Government.* *c*

At the Sessions Court there were two applications for the determination of the learned sessions Judge, namely an application for summary judgment by the respondent under O. 26 r. 2 of the Subordinate Courts Rules and an application by the appellant, the Government, to strike out the application of the respondent under O. 26 r. 2 of the Subordinate Courts Rules for summary judgment on the ground that no such application can be made under O. 26A or O. 43 of Subordinate Courts Rules against the Government i.e., the appellant in this case. The Sessions Court dismissed the appellants application and entered judgment in favour of the respondent. *d*

This was the appeal by the appellant and the only issue raised by the appellant was whether summary judgment under O. 26A of the Subordinate Courts Rules can be made against the Government i.e., the appellant. *e*

Held:

[1] Order 1 r. 4(1) of the Subordinate Courts Rules is clearly not intended to cover the situation as in the present case. Summary judgment in the Subordinate Courts is clearly applicable as against the Government, i.e., it should be treated the same as proceedings between subjects by virtue of s. 29(1) of the said Act. *f*

[2] The Sessions Court Judge was right in dismissing the application of the appellant in respect of the issue of O. 26A of the Subordinate Courts Rules relating to the proceeding against the Government for summary judgment and the High Court affirms it accordingly. *g*

[3] The Sessions Court Judge was in error in granting the summary judgment as that was a proper case for the Court to exercise its revisionary powers under s. 33 of the Courts of Judicature Act and accordingly her order granting summary judgment is set aside.

[4] The case is to be remitted to the Sessions Court Judge to consider the respondents application for summary judgment on its merits. *h*

Legislation referred to:
Courts of Judicature Act 1964, s. 16(p)
Government Proceedings Act 1956, ss. 29(1), 42(2)(c)
Rules of the High Court 1980, O. 73 r. 5(1)
Subordinate Courts Rules Act 1955, s. 3
Subordinate Courts Rules 1980, O. 1 r. 4(1), O. 43, O. 26A r. 2 *i*

For the appellant - Bernard Philip Lanat, Legal Officer; State Attorney-General's Chambers
For the respondent - Stanley Eddy; M/s. Battenberg & Talma Advocates

JUDGMENT

Haidar Mohd. Noor J:

From the notice of appeal dated 9 October 1989, filed by the appellant, Sarawak Government, it would seem clear that the appeal is in respect only of the order of the learned Sessions Court Judge dismissing the appellant's application to strike out the respondent's application under O. 26A r. 2 of the Subordinate Courts Rules 1980 ('SCR') on 7 October 1989.

From the record of the appeal it is clear that there were in fact two applications for the determination of the learned Sessions Court Judge, namely an application for summary judgment by the respondent under O. 26A r. 2 of SCR (p. 11 of the record) and an application by the appellant to strike out the application of the respondent under O. 26A r. 2 of SCR for summary judgment on the ground that no such application can be made under O. 26A or O. 43 of SCR against the government, i.e., the appellant in this case. What happened in this case is that the learned Sessions Court Judge dismissed the appellant's application and entered judgment in favour of the respondent as per the respondent's application even though the parties have not addressed her in respect of the respondent's application as can be seen from the appeal record and conceded to by Mr. Stanley Eddy, Counsel for the respondent. It is clear that in making the order that she did in favour of the respondent the learned Session Court Judge has not addressed her mind properly on such application but treated it as a matter of course that in dismissing the appellant's application, she should allow the respondent's application. This is obvious by her one paragraph judgment though perhaps, it can hardly be said to be a well-reasoned judgment (p. 26 of the record). With respect, she has patently committed an error in making the order in favour of the respondent. Be that as it may, it is best that I consider first the dismissal of the appellant's application. In any event, the present appeal would appear to be confined only to the dismissal of the appellant's application.

There is only one issue raised by the appellant - can a summary judgment under O. 26A of SCR be made against the government i.e., the appellant?

The Counsel for the appellant submitted that O. 26A of SCR is inapplicable as against the government and relied on O. 1 r. 4(1) of SCR to be read with O. 73 r. 5(1) of the Rules of the High Court 1980 ('RHC').

Order 1 r.4(1) of SCR reads:

> 4(1) In any matter or procedure or practice not provided for in these rules, the procedure and practice for the time being in use or in force in the High Court shall, as near as may be, be followed and adopted.

In both the Rules of the High Court 1980 and Subordinate Court Rules there is a provision in O. 73 and O. 43 respectively relating to "proceedings by and against the government". In O. 73 of Rules of the High Court 1980, r. 5(1) thereof provides:

> No application against the Government shall be made under O. 14 r. 1, or O. 81 r. 1, in any proceedings against the Government nor under O. 14, r. 5, in any proceedings by the Government.

However, there is no similar provision as r. 5(1) above in O. 43 of Subordinate Court Rules. The appellant's Counsel relied on the views expressed by K.S. Dass & Abdul Hamid bin Hj. Mohamed in Subordinate Courts Practice (1981) when in dealing with O. 26A of SCR the learned authors said at p. 432:

> The circumstances which may be considered that the case is not within O. 26A are: (1) the statement of claim discloses that the action is one which is specifically excluded for summary judgment by virtue of O. 26A, r. 2(1); (2) where the affidavit in support of the application is defective and (3) *where the summary judgment is sought against the government.* In all these cases the Court should dismiss the application. (Emphasis added)

At the footnote, the learned authors said:

> There is clear provision in the RHC 1980, O. 73, r. 5(1) to the effect that O. 14 judgment cannot be made against the government *but there is no such provision in the SCR 1980.* By virtue of O. 1, r. 2(1) of SCR, (should read r. 4(1)) the procedure and practice in the High Court can be followed. It follows therefore that an application for summary judgment under O. 26A cannot be made against the government. (Emphasis added)

Section 29(1) of the Government Proceedings Act 1956 ("the said Act") prescribed the powers of the Court to make orders or relief in respect of civil proceedings by or against the government. Section 29(1) reads:

> In any civil proceedings by or against the Government the Court shall, ***subject to this Act, have powers to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief*** as the case may require:

Provided that:

(a) ...

(b) ...

(Emphasis added)

Section 42(1) of the said Act, provides that any power to make rules shall include power to make rules for the purpose of giving effect to the said Act, and any such rules may contain provisions to have effect in relation to any proceedings by or against the government in substitution for or by way of addition to any of the rules applying to proceedings between subjects. One of the provisions that shall be made by rules of Court is provided by s. 42(2)(c) of the said Act which reads:

> ..... for excepting proceedings brought against the Government from the operation of any rule of Court providing for summary judgment without trial, and for enabling any such proceedings to be put in proper cases into any special list which may be kept for trial of short causes in which leave to defend is given under any such rule of Court as aforesaid;

In respect of the High Court, the Rules Committee made O. 73 r. 5(1) of RHC in which no application against the government shall be made under O. 14 r. 1 (i.e., summary judgment) invoking, in my view, s. 16(p) of Courts of Judicature Act 1964 ("CJA") which reads:

> ..... for any purpose for which rules of Court may be made under any written law.

In my opinion 'written law' refers particularly to s. 42(2)(c) of the said Act.

However, in respect of the Subordinate Courts, the Rules Committee made provision for summary judgment under O. 26A of SCR without excepting such application against the government. Nor does O. 43 of SCR (in respect of proceedings by or against the government)

provide similar provision as O. 73 r. 5(1) of RHC excepting summary judgment against the government thereby implying that summary judgment against the government would appear to be applicable in the Subordinate Courts as opposed to the High Courts. It thus would appear to give effect to s. 29(1) of the said Act by making the proceedings against the government in respect of summary judgment same as between subjects. It is to be noted that the composition of the Rules Committee in respect of the High Courts (s. 17 of CJA) and the Subordinate Courts (s. 3 of the Subordinate Court Rules Act 1955) are substantially the same except that in respect of the Subordinate Courts, the Sessions Court Judge in West Malaysia and the Magistrates of the First Class in East Malaysia may be called upon to be members by the Lord President. In any event, in both the Rules Committees the government is represented by the Attorney-General or his representative/s as may be applicable. It would seem clear to me that in respect of the Subordinate Court the provision excepting the government against summary judgment was deliberately left out presumably because pre the amendment to the increase in the civil jurisdiction of the Subordinate Courts in 1987, the jurisdiction of the subordinate courts was only RM25,000, a figure that may be considered small for excepting the summary judgment against the government and therefore the provisions of s. 42(2)(c) of the said Act was not invoked otherwise the Attorney-General, as the representative of the government, would have made such representation to the Rules Committee in respect of the Subordinate Courts. Therefore, in my view, O. 1 r. 4(1) of SCR is clearly not intended to cover the situation as in the present case. In that event I am of the opinion that summary judgment in the Subordinate Courts is clearly applicable as against the government, i.e., it should be treated the same as proceedings between the subjects by virtue of s. 29(1) of the said Act. With respect, therefore, I do not agree with the views of the learned authors in the Subordinate Courts Practice (1981) that O. 26A of SCR is inapplicable to the government. In the circumstances I agree with the order of the learned Sessions Court Judge dismissing the application of the appellant in respect of the issue of O. 26A of SCR relating to the proceedings against the government for summary judgment and affirm it accordingly.

In respect of the order of the learned Sessions Court Judge granting the summary judgment against the appellant, as I said earlier, she has not properly addressed her mind to the said application and this was rightly conceded by the Counsel for the respondent also. In my view, she is clearly in error here. Though the appellant in the notice of appeal apparently did not appeal against her order giving summary judgment in favour of the respondent but as she obviously committed an error in making such an order, in my opinion, this is a proper case for the Court to exercise its revisionary powers under s. 33 of CJA and I accordingly set aside her order of summary judgment. In the circumstances I would remit the case to her for her to consider the respondent's application for summary judgment on its merits. I would order the costs of this appeal and the applications before her to the respondent in any event.

Also found at [1990] 1 CLJ 1224